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Before the  
**Federal Communications Commission**  
Washington, DC

In re Applications of	)	MM Docket No. 93-107
	)	
DAVID A. RINGER	)	File No. BPH-911230MA
	)	
ASF BROADCASTING CORP.	)	File No. BPH-911230MB
	)	
WILBURN INDUSTRIES, INC.	)	File No. BPH-911230MC
	)	
SHELLEE F. DAVIS	)	File No. BPH-911231MA
	)	
OHIO RADIO ASSOCIATES	)	File No. BPH-911231MC

**RECEIVED**

For Construction Permit for an  
FM Station on Channel 280A in  
Westerville, OH

**AUG 12 1994**

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

To: The Review Board

**PARTIAL OPPOSITION TO REQUEST FOR ACCEPTANCE  
OF AMENDMENT, AND RESPONSE**

Shellee F. Davis ("Davis"), by her attorney, hereby submits her partial opposition and response to the "Request for Acceptance of Response" and "Response to Oppositions" filed by Wilburn Industries, Inc. ("WII") in this proceeding. With respect thereto, the following is stated:

WII seeks leave to respond, and in fact does respond, to information and arguments presented by Davis in the course of her "Opposition to Petition to Deny" ("Davis Opposition") filed on July 22, 1994. Some points raised by WII are valid observations, other aspects misread or misinterpret the law, and other points are now moot.

**Due Diligence**

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With respect to its "due diligence" showing, Davis opposed acceptance of WII's amendment based the absence of information in WII's July 15, 1994 Petition indicating the existence of "due diligence." WII responds, stating that certain justification and explanation exists in the record, pointing to the information contained in its April 13 "Petition for Leave to Amend" ("April 13 Petition"). WII accuses Davis of attempting to mislead the Board by failing to reference or acknowledge the information contained in the April 13 Amendment.

In preparing her Opposition to the July 15 Petition, counsel for Davis relied only on information contained in the four-corners of the July 15 Petition, and did not review (or recall) the showing made in WII's April 14 Petition, nor did her counsel utilize that information in preparing the Petition. WII is correct that upon review of the information contained in the April 14 Petition, that some explanation concerning the date WII learned of the unavailability of its original transmitter site can be learned, and WII is correct that a full explanation as to why the letter from Mrs. Buell that it has in its possession was dated even before it had officially lost access to its original transmitter site also exists already in the record of this case. Accordingly, Davis withdraws in its entirety the argument and discussion contained in Paragraphs 7-8 of its Petition.<sup>1</sup>

Davis does not, however, withdraw the basic argument and conclusion contained in Paragraph 9 of its pleading. Davis agrees with WII that "[a]s an initial matter, the period between April 8, 1994 and July 15, 1994 is not on its face an unreasonable period within which to have an entirely new engineering proposal prepared." WII "Response to Opposition" at 3. Facts, which WII was free to provide if they exist, which demonstrate ongoing activity in

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<sup>1</sup> The argument contained therein was made in ignorance of the true facts. Counsel respectfully apologizes for this oversight.

accomplishing the diligence of its site amendment submission, could indeed establish the "due diligence" of the amendment and the satisfaction of WII with the Commission's standards. As Davis noted, however, WII has provided virtually no information from which a finding of "due diligence" validly can be derived. From the state of the record, virtually no activity occurred between April 13 (the approximate date on which WII learned its former site no longer was available) and early July (when WII's site amendment was prepared). No explanation, even now, explains why WII's site amendment was not filed with more diligence or speed, especially since it has already acquired in late March 1994.

Absent such a showing, it still is respectfully urged that WII's Petition be denied.

### **Site Availability**

Davis reported to the Commission the fact that she learned that the land already was leased to a third party. Counsel for Davis argued that insofar as there was no indication that WII had yet received authorization from the tenant to utilize the land, WII had not yet received a true, valid "reasonable assurance" of the availability of the site.

First, it should be noted that WII misconstrues a portion of Davis' pleading. Although in a factual recitation she noted that Mrs. Buell, in any sort of individual capacity, is not the technical owner of the land, herself, (despite the fact that WII had identified Mrs. Buell as the "owner" of the land) (Davis Opposition at 8 ¶ 12), Davis did not intend to imply, and did not argue, that reasonable assurance could be lacking due simply to that factual error. "Reasonable assurance" can be based upon negotiations with an "owner" or its designated representative, and as Executor of the estate which owns the land, Mrs. Buell undeniably has authority to bind the actual "owner" and to convey whatever right the estate/owner has. Cf. WII "Response to Oppositions" at 5-6.

It also should be noted that WII perhaps too defensively seeks to establish its "good faith" in its delicts with respect to the status of the ownership of the land and the extent to which the land was leased. WII "Response to Oppositions" at 6-7. Davis has no evidence that any of WII's actions have been taken in anything other than in good faith. Mrs. Buell supplied initially to Davis information similar to that which it provided to WII, and the actual state of affairs were learned only after specific inquiries were made by Davis to discover whether the site was, in fact, actually available for her use.

In approaching Mr. Fred Hendron and securing a letter from him, WII apparently implicitly concedes that it may not have had true, valid, "reasonable assurance" of the availability of the site previously. If so, Davis agrees with that conclusion in light Mrs. Buell's written, if not belated, realization that the farmer had not yet been consulted, and her belief that such permission would be a necessary prerequisite to her agreeing to a lease of the site. To the extent that WII has at least now secured permission both from the land owner and the land's current tenant, Davis agrees that "reasonable assurance" for the site appears to exist.<sup>2</sup>

### **New Issue**

WII criticizes Davis for raising this issue (WII "Response to Oppositions" at 6-7), yet disregards the fact the Mass Media Bureau recent opposed acceptance of WII's amendment on precisely the same basis. However, insofar as WII has now received a determination of "no hazard" from the Federal Aviation Administration ("Supplement to Petition for Leave to Amend"

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<sup>2</sup> Counsel for Davis has confirmed with Mrs. Buell's daughter, Tamara Caudy, that Mr. Hendron is, indeed, the formerly-undisclosed farmer to which reference had been made. Mrs. Caudy again has requested, on behalf of her mother, that applicants (including Mrs. Davis) not contact Mr. Hendron directly. Accord, Davis Opposition at 8. Mrs. Davis is honoring that request. South Florida Broadcasting Co., Inc., 57 R.R.2d 495, 500 (Rev. Bd. 1984) (applicant cannot ignore site-owner's conditions for access to the land and nevertheless claim that it has "reasonable assurance").

(filed August 8, 1994)), this matter is now moot.

**Financial Documentation**

WII claims that "[t]here is no support in law or logic" to require full financial disclosure at the time an applicant amends the financial portion of its application, post-designation and post-hearing. WII "Response to Oppositions" at 9. Counsel for Davis stands by his reading of the law. Ringer and ASF, in amending the financial portions of their applications, apparently subscribe also to Davis' reading of the law, and consequently were fully able and willing to comply past Commission precedent.

WII's restrictive reading of Commission precedent appears to flow from its belief that "[financial] documentation need not be submitted in the ordinary course." WII "Response to Oppositions at 9 n.7. That statement, of course, is wrong. In the "ordinary course" (with respect to an applicant's pre-designation financial budget and arrangements), applicants now have to have "submit" that information to each other as part of the Standard Document Production Order, 47 C.F.R. § 1.325(c).

In light of WII's total failure to provide information sufficient to justify acceptance of its financial amendment, it again is asserted that this aspect of WII's Petition should be denied.

WHEREFORE, it is respectfully requested that the "Request for Acceptance of Response" and "Response to Oppositions" be granted and denied to the extent identified herein.

Respectfully requested,

SHELLEE F. DAVIS

By:   
Dan J. Alpert

1250 Connecticut Ave.  
7th Floor  
Washington, DC 20036  
(202) 637-9158

August 11, 1994

**CERTIFICATE OF SERVICE**

I, Dan J. Alpert, hereby certify that foregoing document was served on August 11, 1994 upon the following parties by First Class Mail, postage prepaid, or by Hand:

James Shook, Esq.  
Hearing Branch  
Federal Communications Commission  
Room 7212  
2025 M Street, NW  
Washington, DC 20554

Arthur V. Belendiuk, Esq.  
Smithwick & Belendiuk, P.C.  
1990 M Street, NW  
Suite 510  
Washington, DC 20036

James F. Koerner, Esq.  
Baraff, Koerner, Olender & Hochberg, P.C.  
5335 Wisconsin Ave, NW  
Suite 300  
Washington, DC 20015-2003

Stephen T. Yelverton, Esq.  
McNair & Sanford  
1155 15th St., NW  
Suite 400  
Washington, DC 20005

Eric S. Kravetz, Esq.  
Brown, Nietert & Kaufman, Chtd.  
1920 N Street, NW  
Suite 660  
Washington, DC 20036

  
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Dan J. Alpert